

FOOD MAIL SECTION

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Fcc [] Washington, D.C. 20554

FCC 97M-204
80211

In Matter of) WT DOCKET NO. 94-147
)
JAMES A KAY, JR.)
)
Licensee of one hundred fifty two)
Part 90 licenses in the)
Los Angeles, California area.)

ORDER

Issued: December 8, 1997 Released: December 10, 1997

This is a ruling on the pleading styled Emergency Motion To Alter Deposition Schedule that was filed by James A. Kay, Jr. ("Kay") on December 5, 1997. The Wireless Telecommunications Bureau ("Bureau") filed its Opposition on December 8, 1997, in the a.m. The Bureau states in its Opposition that Kay's Motion was received late in the afternoon of Friday, December 5. It is recognized that Monday, December 8, is a travel day as the depositions start on Tuesday, December 9, 1997, in the a.m.

Depositions were scheduled at least one month ago to commence tomorrow Tuesday, December 9, 1997, in Los Angeles. There have been two recent rulings (FCC 97M-198 and FCC 97M-199), an informal telephone conference of December 2, 1997, and a formal Prehearing Conference that was held on December 4, 1997, dealing with the question of the sequestration of witnesses. Initially, counsel for both parties negotiated a schedule of deposition witnesses. Subpoenas were presented and signed by the Presiding Judge in early November, 1997. Since the issuance of deposition subpoenas on November 6, 1997, up until the telephone conference of December 2, 1997, counsel for Kay was representing that Mr. Kay would not be available on December 9, 1997, to be deposed as the first witness. If Kay had agreed to be deposed first, as had been suggested by the Bureau from the outset, the sequestration issue as to Kay could have been avoided. After being deposed as the first witness, Kay could have been present at each subsequent deposition. However, Kay's counsel only offered Mr. Kay as the fifth witness on December 11-12, 1997. In reliance on those dates that were selected in early November by Kay and his counsel, the Bureau obtained and served subpoenas for the depositions of other witnesses.

At the Prehearing Conference of December 4, 1997, Kay's counsel requested on-the-record that the deposition schedule be changed to permit Mr. Kay to be taken as the first witness. But by that time, the Bureau had arranged for other witnesses who in turn had arranged their schedules. For reasons of accommodating witnesses, the Presiding Judge refused to order Kay's inordinately late request. Also, to attempt to adjust a schedule at this late date might lead to serious disruption of the depositions since the Bureau has been preparing its questions and documents based on the schedule as set. That ruling on-the-record in which the Presiding Judge denied Kay's request to change the deposition schedule should have ended the discussion. Nothing

further was heard on the question of altering the deposition schedule until Kay filed his "Emergency" Motion on December 5, 1997.

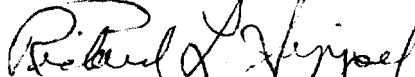
The Bureau represents, and it is accepted, that deposition preparation for the first day is well along and it would be disruptive to the Bureau's preparation to now change the order of deposition witnesses. Also, all four non-party deponents scheduled for December 9-10 are under subpoena. The Bureau would run a risk of losing the opportunity to depose some or all of those witnesses if they should be released from their subpoenas. Negotiations for changes would be distracting at this late date both to the Bureau's preparation as well as being distracting to the witnesses and possibly greatly inconvenient since the witnesses under subpoena have already set aside the time to be deposed.

Under these circumstances, there is no new reason advanced by Kay for considering the "emergency" relief which he now seeks. It has been held in an earlier ruling that the Commission rules preclude reconsideration of interlocutory rulings of Commission administrative law judges. 47 C.F.R. §1 106(a)(1). See Order FCC 97M-199, released December 8, 1997 (copies provided counsel on issuance date). Yet Kay is once more asking for an unauthorized reconsideration of an interlocutory ruling. Kay argues that he is asserting a constitutional right for his attendance as a party at each deposition without regard to sequestration. However, in making that argument, Kay overlooks or purposefully decided not to cite the Commission's decisional authority on sequestration that was previously relied on by the Presiding Judge in ordering sequestration here: Black Television Workshop of Los Angeles, Inc., 8 F.C.C. Rcd 4192, 4195 n.20 (1993). See Order FCC 97M-147, released December 5, 1997 (copies provided counsel on issuance date). There was nothing new or novel under Commission authority or policy in the Presiding Judge's sequestration ruling. Therefore, there will be nothing further written or discussed on the subject. The depositions must go forward as scheduled without further interruption.

Ruling

Accordingly, IT IS ORDERED that the "Emergency Motion To Alter Deposition Schedule" filed by James A Kay, Jr. on December 5, 1997, IS DENIED.¹

FEDERAL COMMUNICATIONS COMMISSION


Richard L. Sippel

Administrative Law Judge

¹ Copies of this Order were e-mailed or faxed before 2 p.m. on the date of issuance to permit forwarding to those counsel who are enroute to California.